STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
HORACE DAVIS III	:	DETERMINATION DTA NOS. 822528
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2003 through February 28, 2007.	:	AND 822833

Petitioner, Horace Davis III, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2003 through February 28, 2007.

A hearing was held before Timothy Alston, Administrative Law Judge, at 633 Third Avenue, New York, New York, on December 8, 2009 at 10:30 A.M., with all briefs to be submitted by April 15, 2010, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Byung J. Pak, Esq., and Eric A. French, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Nicholas A. Behuniak, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation issued certain notices of determination in violation of a United States Bankruptcy Court order and whether such notices are therefore invalid as a matter of law.

II. If not, whether petitioner filed a timely request for conciliation conference in respect of such notices of determination.

III. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

IV. Whether, under the facts herein, the Division properly deemed the entire charge for a particular telephone service subject to sales tax where such service provided unlimited intrastate and interstate phone service for a single monthly charge.

V. Whether petitioner has established any facts or circumstances warranting the abatement of penalties imposed herein pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

1. Petitioner, Horace Davis III, was, at all times relevant herein, an officer of Trinsic Communications, Inc. (Trinsic),[1] a publicly traded company that provided landline telecommunications services throughout the United States, including New York State. Petitioner stipulated that during the period at issue he was a responsible officer of Trinsic for purposes of the Tax Law.

2. Trinsic offered its customers several types of telephone service plans. Some plans provided unlimited local calling and unlimited domestic long distance calling for a fixed monthly price. These plans were generally referred to as "Trinsic Unlimited" plans. For Trinsic's New York customers, the unlimited plan was listed on customer bills as "NY Option 1 - Unlimited 1." Purchasers of such an unlimited plan were charged a fixed dollar monthly fee, regardless of actual usage, which included both intrastate and interstate calls. Although all calls were listed on

[1] Prior to December 2004, Trinsic was known as Z-Tel Communications, Inc.

monthly customer bills under unlimited plans, there were no charges associated with any domestic calls.[2]

3. Trinsic also had a group of plans called "value based plans." These plans featured unlimited local calling and a limited number of long distance calling minutes included in a fixed monthly fee. Long distance calls in excess of the plan's included minutes were billed on a per call basis.

4. In addition, Trinsic offered plans where the long distance service was not bundled with local telephone service. Customers of such plans purchased local and long distance minutes separately.

5. The Division of Taxation (Division) commenced an audit of Trinsic in 2006. By letter dated January 18, 2006, the Division requested that Trinsic make available for review all of its books and records pertaining to its sales and use tax liability for the period June 1, 2002 through May 31, 2005.

6. The Division had conducted an electronic data processing (EDP) audit in a prior audit of Trinsic (then known as Z-Tel Communications, Inc.) for the period March 1, 1999 through February 28, 2002. Near the start of the audit at issue, the Division's auditor indicated to Trinsic's representative that an EDP audit again would be the Division's preferred method. As explained by the auditor at hearing, such an audit method required access to computer files of all transactions and activities, including all individual telephone calls, during the audit period. Short of electronic data for the entire audit period, the Division requested, alternatively, computerized

[2] Contrary to assertions made by both parties, the record indicates that the unlimited plan did not include international calls in the fixed monthly fee. Based on a review of customer bills in the record, it appears that international calls were billed on a per call basis under unlimited plans with the cost of international calls determined by the duration (in minutes) of the call.

or hard copy records for a test period. Trinsic's representative advised the Division's auditor, however, that Trinsic was experiencing serious financial difficulties and that many employees had been laid off and many were voluntarily leaving the company. In July 2006, at the time the auditor was conducting a field visit to Trinsic's representative's Atlanta, Georgia, offices, Trinsic had only one IT (information technology) person remaining on its staff and this person had very limited time to devote to the audit. Consequently, as indicated at the hearing by its former vice president of internal audit, Trinsic lacked sufficient personnel and resources to prepare and make available all of the information requested by the Division. In addition, Trinsic used an outside vendor to prepare its customer bills, and because there was a cost associated with requesting such bills, given Trinsic's financial straits, it could not readily access the customer billing data for the relevant period. Accordingly, Trinsic could not accommodate the Division's request to perform an EDP audit and could not make sufficient billing information available for the Division to perform a detailed review of a test period within the audit period.

7. Through its customer service department Trinsic did provide the Division with 10 "tax analysis reports." These were internal company documents similar in content to bills sent to customers. All 10 of the tax analysis reports provided were from November 2004 and all were drawn from customers who had purchased one of Trinsic's unlimited products, referenced on customer bills[3] as "NY Option 1 - Unlimited 1." The tax analysis reports indicate a charge of $49.99 for this unlimited plan. The tax analysis reports list each call made during the month, but as noted previously (***see*** Finding of Fact 2), there is no charge associated with any specific call under the unlimited plan, other than calls made internationally.

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[3] Although, as noted, Trinsic provided tax analysis reports to the Division on audit, at the hearing petitioner submitted copies of the customer bills that correspond to the 10 tax analysis reports reviewed by the Division on audit. The information on the bills is consistent with the information on the tax analysis reports.

8. Given the inability to perform an EDP audit and the lack of access to billing information as noted, the Division used the 10 tax analysis reports to estimate Trinsic's sales tax liability for the period at issue. The Division was aware at that time that the NY Option 1-Unlimited 1 was one of several telephone service plans sold by Trinsic and that Trinsic had thousands of customers in New York

9. In its calculation of additional tax due, the Division first determined a sales tax base for each of the tax analysis reports. That is, the Division totaled the charges for phone service it deemed taxable and totaled the various franchise tax and excise tax charges attributable to such taxable phone service charges. Most significantly, with respect to the instant matter, in calculating the sales tax base the Division deemed the entire $49.99 charge for the New York Option 1 - Unlimited 1 plan subject to tax.

10. After calculating the sales tax base for each of the 10 tax analysis reports, the Division calculated the sales tax due on such amounts using the relevant sales tax rates. The Division calculated a total of $68.29 in sales tax due on the 10 tax analysis reports. Trinsic actually charged those 10 customers a total of $59.12 in sales tax. The $9.17 difference between sales tax due per the Division's computations and sales tax due as indicated by the tax analysis reports was then divided by the $59.12 sales tax due according to the reports, resulting in an error rate of 15.50 percent. The Division then extrapolated additional tax due for the entire audit period by applying the error rate to sales tax reported and paid by Trinsic according to its sales tax returns for each of the sales tax quarters comprising the audit period. In total, the Division determined

$1,919,952.17 in additional tax due from Trinsic for the period June 1, 2002 through February 7, 2007.[4]

11. During the audit, by written request dated August 22, 2006, the Division requested a breakdown of the price for services that bundled long distance and local calling, such as NY Option 1 - Unlimited 1. The Division specifically requested information as to what was included in the bundled charge and the cost associated with each charge. Trinsic did not respond to these requests.

12. By May 2006, Trinsic began to include on the bills of its NY Option 1 - Unlimited 1 customers an "additional note," which indicated a breakdown of the Option 1- Unlimited 1 charge. For example, in May 2006 the charge for Option 1- Unlimited 1 was $51.49. Customer bills for this month contained an additional note that broke this charge down as "$43.40 for local/intrastate LD/V-Mail services and $8.09 for interstate services." A copy of this May 2006 bill was provided to the Division during the audit.

13. The additional note was put on customer bills in 2006 in response to the Division's prior audit of Trinsic where, similar to the present matter, the Division had assessed sales tax on the total of charges for bundled services.

14. Prior to the additional note listing a specific amount for interstate services as described above, Trinsic's bills provided a breakdown that did not specifically identify an interstate service dollar amount. For example, a Trinsic bill from January 2006 for a "NY Trinsic Value" plan customer (a "value based plan" [***see*** Finding of Fact 3]) contains the following "additional note":

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[4] By letter dated April 19, 2007 the Division updated its request for records from Trinsic to cover the period June 1, 2005 through February 7, 2007. No records were provided in response to this request.

"The Monthly Service Charge associated with your Trinsic Bundled Service of $31.49 is made up of $21.49 for Local Service and Intrastate long distance and $10.00 for other services."

15. There is no evidence in the record of Trinsic's basis or rationale for the breakdown in the charge for NY Option 1 - Unlimited 1 service as set forth on the "additional note" on the May 2006 bill as noted above. Nor is there any evidence in the record for the breakdown in the charge for the NY Trinsic Value service as set forth on the January 2006 bill as noted above.

16. On March 2, 2007, the Division issued to petitioner, as a responsible officer of Trinsic, a Notice of Determination, which asserted $646,823.97 in tax due plus penalty and interest for the period February 29, 2004 through May 31, 2005. This assessment is based on the audit of Trinsic as described herein.

17. On August 16, 2007, the Division issued to petitioner, as a responsible officer of Trinsic, a Notice of Determination, which asserted $512,209.24 in additional tax due, plus penalty and interest, for the period June 1, 2005 through February 28, 2007. This assessment also is based on the audit of Trinsic as described herein.

18. On July 26, 2007, the Division issued to petitioner, as a responsible officer of Trinsic, a Notice of Determination, which assessed $39,041.71 in additional tax due, plus penalty and interest, for the period December 1, 2006 through February 28, 2007. This assessment is premised on the difference between tax reported and tax paid by Trinsic for that period.

19. At hearing petitioner submitted summary documentation purporting to show the percentage of Trinsic's New York revenue attributable to various services designated by petitioner as "unlimited" and "value" during the relevant period. The source of this information was Trinsic's data warehouse department. Trinsic's former vice president of internal audit requested that the data warehouse produce this information some time during the first quarter of

2007, but it was not provided to the Division during the audit. Purportedly using data from 7 months within the audit period (January and June of 2004 through 2006 and January 2007) to calculate the percentage of Trinsic's New York revenue attributable to unlimited and value plans, the summary documentation indicates that 49.6 percent of Trinsic's New York revenue during the 2003-2007 period was attributable to unlimited plans and 27.4 percent was attributable to the value plan. The balance of revenue (23 percent) was attributable to nonbundled service plans. In addition to the NY 1 - Unlimited 1 service as previously described herein, the summary documentation includes the following as unlimited plans: Trinsic 1000, Home Connection 500, and Home Connection Unlimited. The Trinsic 1000 plan includes 1,000 minutes of domestic long distance in addition to unlimited local calling. Home Connection 500 and Home Connection Unlimited are not described elsewhere in the record.

20. According to this summary documentation, Trinsic's total New York revenue attributable to all service plans (bundled and nonbundled) totaled $151,571.06 for the month of January 2007. By comparison, Trinsic's sales tax return for period December 1, 2006 through February 7, 2007 reported $3,722,461.00 in gross and taxable sales.

21. Petitioner also submitted documentation purporting to show Trinsic's uncollected New York sales tax for the years 2004, 2005 and 2006. This documentation purports to list uncollected sales tax amounts per customer identified by locality. By this documentation petitioner claims that Trinsic had uncollected sales tax totaling $165,551.30 in 2004, $172,772.67 in 2005 and $293,849.01 in 2006. The source of this information was Trinsic's data warehouse department.

22. Petitioner also claimed that Trinsic had uncollected sales tax of $745,412.50 for the period June 1, 2002 through November 30, 2002, $202,590.00 for the period December 1, 2002

through February 29, 2004, and $24,896.68 for the period December 1, 2006 through February 7, 2007. While the source of this information was Trinsic's data warehouse department, petitioner offered no documentation in support of these claims.

23. At all times relevant herein, Trinsic's sales tax returns were prepared by a certified professional accounting firm engaged by Trinsic for that purpose.

24. On February 7, 2007, Trinsic filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Alabama (the Bankruptcy Court). On April 24, 2007, Trinsic's petition was converted to a proceeding under Chapter 7 of the Bankruptcy Code. The Division filed multiple proofs of claim against Trinsic's bankrupt estate, including claims premised on the assessments arising from the audit described herein.

25. On June 27, 2007 the Bankruptcy Court issued an order in response to a motion brought by the bankruptcy trustee that "extend[ed] the protection provided by 11 U.S.C. § 362 [automatic stay provision] to the non-debtor officers and directors [of Trinsic]. . . as to any and all claims asserted by any state taxing authority . . . for a period of six months from the date of [the] order."

26. Pursuant to a January 20, 2009 stipulation and order by the Bankruptcy Court, the Division withdrew its claims against Trinsic's bankrupt estate. Such stipulation and order expressly provided that it did not affect the Division's right to assess or to pursue collection of assessments from "persons required to collect tax" within the meaning of under Tax Law § 1131(1).

27. Petitioner challenged the notices of determination dated July 26, 2007 and August 16, 2007 (***see*** Findings of Fact 17 and 18) by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) on October 15, 2008.

28. On October 31, 2008, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the July 26, 2007 and August 16, 2007 notices was untimely and stated, in part:

> The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on July 26, 2007 and August 16, 2007, but the request was not mailed until October 15, 2008, or in excess of 90 days, the request is late filed.

29. To show proof of proper mailing of the Notice of Determination dated July 26, 2007 the Division provided the following: (i) an affidavit, dated October 5, 2009, of Patricia Finn Sears, supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated October 6, 2009, of James Steven VanDerZee, mail and supply supervisor of the staff of the Division's mail processing center; and (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 26, 2007.

30. Similarly, to show proof of proper mailing of the Notice of Determination dated August 16, 2007 the Division provided the following: (i) an affidavit, dated October 5, 2009, of Ms. Sears; (ii) an affidavit, dated October 6, 2009, of Mr. VanDerZee, and (iii) the CMR postmarked August 16, 2007.

31. Additionally, the parties stipulated that the Milton, Florida, address for petitioner as listed on both the July 26, 2007 and August 16, 2007 notices of determination and the associated CMRs was petitioner's personal address at all times relevant herein.

32. The affidavits of Patricia Finn Sears set forth the Division's general practice and procedure for processing statutory notices.

33. The notices are predated with the anticipated date of mailing. With respect to the July 26, 2007 notice, each page of the 14-page CMR lists an initial date that is approximately 10 days

in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "7/26/07," to reflect the actual mailing date. With respect to the August 16, 2007 notice each page of the 22-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. The date on the first page of this CMR was also manually changed in accordance with the Division's general procedure to "8/16/07," to reflect the actual mailing date.

34. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

35. Page 13 of the July 26, 2007 CMR contains information on the notice bearing that date and establishes that on July 26, 2007 a notice with the control number 7104 1002 9730 0205 1457 was sent to petitioner at his Milton, Florida, address.

36. Page 21 of the August 16, 2007 CMR contains information on the notice bearing that date and establishes that on August 16, 2007 a notice with the control number 7104 1002 9730 0268 7830 was sent to petitioner at his Milton, Florida, address.

37. The VanDerZee affidavits describe the general operations and procedures of the Division's Mail Processing Center. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a

windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

38. A review of the CMR submitted by the Division in respect of the July 26, 2007 notice confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 145, which has been circled, and the page is postmarked and initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date July 26, 2007, confirming that the notices were mailed on that date.

39. A review of the CMR submitted by the Division in respect of the August 16, 2007 notice confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 234. Below this number, "234" has been handwritten and circled and the page is postmarked and initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date August 16, 2007, confirming that the notices were mailed on that date.

40. The Division submitted proposed findings of fact numbered 1 through 21. Proposed findings of fact 1-11, 16, 17, and 19-21 are accepted and have been incorporated, in substance, herein. Proposed findings of fact 14, 15, and 18 are unsupported by the record and are therefore rejected. Proposed finding of fact 13 contains a legal conclusion and is thus rejected. Proposed finding of fact 12 is irrelevant and is rejected.

CONCLUSIONS OF LAW

A. Petitioner contends that the Notices of Determination dated July 26, 2007 and August 16, 2007 were issued in contravention of the June 27, 2007 order of the bankruptcy court and are therefore invalid as a matter of law. This contention is rejected. The order of the bankruptcy court extended the protections of the automatic stay provision of the bankruptcy code (11 USC § 362) to officers of Trinsic for a period of six months. There are exceptions to the automatic stay, however, including 11 USC § 362(b)(9)(B), which provides that the stay does not extend to "the issuance to the debtor by a governmental unit of a notice of tax deficiency." Pursuant to this provision, the issuance of the July 26, 2007 and August 16, 2007 Notices of Determination did not violate the automatic stay provision and thus did not in any way contravene the June 27, 2007 order of the bankruptcy court (***cf. Matter of Otto***, Tax Appeals Tribunal, September 22, 2005).

B. Petitioner argues that the exceptions to the automatic stay contained in 11 USC § 362(b)(9) are inapplicable in the present matter because those exceptions apply only to notices issued to debtors. Petitioner argues that he was not a debtor under 11 USC § 362 because he did not file for bankruptcy. This argument is without merit, as it overlooks the fact that the June 27, 2007 order expressly extended the debtor protections of section 362 to nondebtor officers of Trinsic. Hence, the exceptions to the automatic stay under section 362 would also apply to nondebtor officers of Trinsic, such as petitioner. Petitioner further notes that the June 27, 2007

order was issued under the authority of 11 USC § 105(a), a provision that permits the Bankruptcy Court to issue any order that is "necessary or appropriate to carry out the provisions of [the bankruptcy code]" and that, pursuant to such authority, the court "specifically ordered the State of New York from taking any action against Trinsic's former officers with respect to the collection of sales tax" (petitioner's reply brief at 10). This is a gross misreading of the order. As noted previously, the June 27, 2007 order "extend[ed] the protection provided by 11 USC § 362" to nondebtor officers and directors of Trinsic as to any and all claims asserted by any state taxing authority for a period of six months (***see*** Finding of Fact 25). As also noted previously, there are limits to the protection provided by section 362, including section 362(b)(9)(B). The issuance of the July 26, 2007 and August 16, 2007 Notices of Determination was thus not contrary to the June 27, 2007 order.

C. Having concluded that the July 26, 2007 and August 16, 2007 Notices of Determination were not invalid as a matter of law by reason of the bankruptcy court order, it next must be determined whether petitioner's request for conciliation conference in protest of those notices was timely filed.

There is a 90-day limitations period for the filing of a request for conciliation conference which, by statute, runs from the date of issuance of the notice of determination (***see*** Tax Law § 170[3-a][a]; § 1138[a][1]). In this case, however, the bankruptcy court order, in operation with the automatic stay provision (11 USC § 362), had the effect of staying such 90-day period until the order expired. The June 27, 2007 order was in effect for six months, or until December 27, 2007 (***see*** Finding of Fact 25). Petitioner thus had 90 days from that expiration date, or until March 26, 2008, to timely file his conciliation conference request. Petitioner filed his request for conference with respect to the July 26, 2007 and August 16, 2007 Notices of Determination on

October 15, 2008, well beyond the 90-day limitations period. Under such circumstances, if the Division demonstrates proper mailing of the July 26 and August 16 notices, petitioner's request in respect of such notices must be deemed untimely and therefore properly dismissed by BCMS (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991).

D. The Division's burden to show proper mailing requires proof of the date and fact of mailing by making the following showing:

> first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (***Matter of United Water New York, Inc.***, Tax Appeals Tribunal, April 1, 2004; ***see Matter of Katz***).

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices on the dates claimed, i.e., July 26, 2007 and August 16, 2007, respectively. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing records and thereby establish that the general mailing procedure was followed in respect of the subject notices (***see Matter of Deweese***, Tax Appeals Tribunal, June 20, 2002). Further, petitioner has stipulated that the subject notices bore his correct personal address (***see*** Finding of Fact 31). Accordingly, the notices were properly mailed and thus, the 90-day time limit to file a request for conciliation conference with BCMS commenced with the expiration of the bankruptcy court order on December 27, 2007 (***see*** Tax Law § 170[3-a][a]; § 1138[a][1]) and ended on March 26, 2008. As noted, petitioner's request for conference in respect of these notices was not filed until October 15, 2008. BCMS thus properly dismissed petitioner's request as untimely. Accordingly, the Division of Tax Appeals also lacks jurisdiction and may not consider the merits of petitioner's protest of the July 26, 2007

and August 16, 2007 Notices of Determination (***see Matter of American Woodcraft, Inc.,*** Tax Appeals Tribunal, May 15, 2003).

F. Turning to a consideration of the merits of petitioner's protest of the March 2, 2007 Notice of Determination, Tax Law § 1105(b)(1)(B) imposes sales tax on the "receipts from every sale, other than sales for resale, of . . . telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service."

G. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return "when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." (Tax Law § 1138[a][1].)

H. The Division may estimate tax liability pursuant to Tax Law § 1138(a)(1) only where a taxpayer's records are inadequate. To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826 [1987], ***lv denied*** 71 NY2d 806, 530 NYS2d 109 [1988]). Tax Law § 1135(a)(1) requires persons required to collect sales tax to maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of tax due. Sufficiency of records "means the ability to verify taxable sales receipts and conduct a complete audit" (***Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255, 256 [1988]).

I. Here, by its letter dated January 18, 2006, the Division clearly and unequivocally requested that Trinsic make available for review all of its books and records pertaining to its New York sales and use tax liability for the relevant period, i.e., June 1, 2002 through May 31, 2005.

J. In response to that letter and in conversations with the Division's auditor, Trinsic's representative indicated that Trinsic would be unable to accommodate the Division's request to perform an EDP audit because it lacked sufficient resources to make the information available (***see*** Finding of Fact 6). Additionally, other than the 10 tax analysis statements and one customer bill, Trinsic was unable to provide any customer billing information to the Division on audit. Trinsic thus clearly failed to provide or make available records sufficient to enable the Division to conduct a complete audit from which the exact amount of tax could have been determined and the Division's resort to an estimated audit method was therefore proper (***see Matter of Your Own Choice, Inc***., Tax Appeals Tribunal, February 20, 2003).

K. Petitioner does not contest the fact that Trinsic advised the Division that it could not accommodate the Division's request to perform an EDP audit. Indeed, Trinsic's former vice president of internal audit testified to that effect at the hearing (***see*** Finding of Fact 6). Petitioner contends, however, that the Division nevertheless should have conducted such an EDP audit. Petitioner notes that the Division had previously conducted an EDP audit of Trinsic. Petitioner's contention is rejected. Trinsic was required to make its records available "upon demand" by the Division (Tax Law §1135 [g]; ***see Matter of Continental Arms Corp. v. State Tax Commn.***, 72 NY2d 976, 534 NYS2d 362 [1988]). Trinsic failed to comply with this requirement. Consequently, the Division's use of an estimated audit method was justified.

L. In estimating Trinsic's sales tax liability, the Division was required to select a method reasonably calculated to reflect the tax due (***see e.g. Matter of ADGN, Inc.***, Tax Appeals Tribunal, February 2, 1997). The Division's audit of Trinsic met this standard. The reasonableness of an audit method can only be determined based on information made available to the auditor before the issuance of the statutory notices (***see Matter of Queens Discount***

Appliances, Tax Appeals Tribunal, December 30, 1993; ***Matter of House of Audio of Lynbrook***, Tax Appeals Tribunal, January 2, 1992). Here, Trinsic produced only 10 tax analysis reports and one customer bill for review, while its admitted lack of resources foreclosed the possibility of a full EDP audit or a detailed audit of a test period. Trinsic even failed to provide any explanation whatsoever of the breakdown of the charge for unlimited service on the May 2006 bill (***see*** Finding of Fact 11). Under such circumstances, given the nature of the unlimited service and the presumption of taxability under Tax Law § 1132(c)(1), the Division properly deemed the total charge for the unlimited service as taxable (***see*** Conclusion of Law N). Also, although the auditor was aware that Trinsic offered services other than the unlimited service, Trinsic provided no information regarding such other services during the audit. Finally, that the audit was based on such a paucity of information, i.e., 10 customer bills out of thousands of Trinsic customers, is ameliorated by the fact that, even according to petitioner (***see*** Finding of Fact 19), about half of Trinsic's customers purchased the unlimited service and thus had bills similar to the 10 tax analysis reports that formed the basis of the assessment. In any event, it is well established that exactness in the audit result is not required, for the imprecision arises from the taxpayer's failure to make available adequate books and records as required under the Tax Law and thus is properly borne by the taxpayer (***see Matter of Chronos Enterprises***, Tax Appeals Tribunal, December 13, 2007). Accordingly, although the audit in this matter was not "immune from attack" (***see Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 678, 681 [1988]), considering the broad latitude historically given the Division in its choice of audit method (***see Matter of Grecian Sq. v. Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221 [1986]), the method selected was reasonably calculated to reflect tax due.

M. Because the audit method selected was reasonable, it was incumbent upon petitioner to establish by clear and convincing evidence that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (***see Matter of Your Own Choice, Inc.,*** Tax Appeals Tribunal, February 20, 2003). For the reasons that follow, it is concluded that petitioner has failed to meet his burden.

N. Petitioner's primary contention is that the Division improperly deemed the entire charge for NY 1-Unlimited 1 service on the 10 tax analysis reports as taxable. As noted, this audit determination accounted for virtually the entire error rate and thus accounted for all or nearly all of the additional tax at issue. Petitioner contends that because the unlimited service included interstate telephone service, the imposition of tax on the full amount of the unlimited charge was improper because interstate telephone service is excepted from the tax imposed under Tax Law § 1105(b)(1)(B). Consistent with the May 2006 customer bill in the record (***see*** Finding of Fact 12), petitioner asserts that $8.09 of the monthly charge for unlimited service was for interstate telephone service and was not, therefore, subject to tax.

This contention is rejected. As noted, Tax Law § 1105(b)(1)(B) excepts interstate telephone service from sales tax on telephone service. Petitioner has the burden of proving entitlement to any such exception or exclusion from tax (***see Matter of Savemart, Inc. v. State Tax Commn.***, 105 AD2d 1001, 482 NYS2d 150 [1984], ***appeal dismissed*** 64 NY2d 1039, 489, NYS2d 1029 [1985], ***lv denied*** 65 NY2d 604, 493 NYS2d 1025 [1985]; Tax Law § 1132[c]; 20 NYCRR 533.2[a][1]). To determine the proper tax treatment of any service, including a telecommunications service, the analysis must focus on the service in its entirety as opposed to a review of its components (***see Matter of Southern Pacific Communications Co.***, Tax Appeals Tribunal, May 14, 1991; ***Matter of SSOV '81, Ltd.***, Tax Appeals Tribunal, January 19, 1995).

Here, the service at issue, NY 1-Unlimited 1, provided unlimited local and long distance usage for a single charge, regardless of the number or nature (e.g., local, long distance, intrastate, interstate) of calls. Trinsic customers could not purchase long distance or interstate calls separately under this plan. Trinsic unlimited customers thus did not purchase a long distance telephone service, but rather purchased unlimited access to an integrated telephone service that provided both local and long distance service (***see Matter of Penfold v. State Tax Commn.***, 114 AD2d 696, 494 NYS2d 552 [1985]). The entire charge for such service was therefore properly subject to tax.

O. Contrary to petitioner's contention, ***Matter of Southern Pacific Communications Co.*** (Tax Appeals Tribunal, May 14, 1991) does not support petitioner's position. The petitioner in ***Southern Pacific*** provided long distance telephone services that were exclusively interstate in nature and the Tribunal rejected the Division's effort to impose tax under Tax Law § 1105(b)(1)(B) on certain intrastate strands of that interstate service. Similar to the above analysis, the Tribunal found that, in determining whether a taxpayer's activities are involved in interstate commerce, it is improper to isolate and individually examine the separate components of the overall activity being engaged in by such taxpayer. In support of his position herein, however, petitioner focuses on the following argument made by the Division and the Tribunal's response thereto:

> Lastly, the Division argues that if taxable and nontaxable services are covered by a single charge, the entire charge is subject to sales tax. The Division appears to be arguing thereby that the stipulated fact that petitioners' service is interstate in nature is irrelevant (Divisions' brief, pp. 11-13) and that the entire service should be rendered taxable. That position, however, must be rejected because it would result in imposition of tax on an interstate service in clear violation of the exemption provided in Tax Law § 1105(b) for interstate telephone service.

The above language is not, as petitioner asserts, a rejection of a "bundling" rule (***see*** 20 NYCRR 527.1[b]) for telecommunications services. Rather, it is a refutation of the factual premise of the Division's argument. Because all of the services provided by the petitioner in ***Southern Pacific*** were interstate in nature, the imposition of tax on such services would violate the exemption under Tax Law § 1105(b). Moreover, since all of the services were interstate in nature, bundling was not an issue.

P. Even if the charge for unlimited service could be segregated into interstate and intrastate components, the entire unlimited charge in the present matter would nevertheless be properly subject to tax because petitioner has failed to show how much of the unlimited charge was attributable to interstate telephone service. As noted, petitioner contends that $8.09 of the monthly unlimited charge was for such interstate service. This $8.09 amount, however, is derived from Trinsic bills commencing in May 2006 when the total charge for unlimited service was $51.49. There is no evidence of any breakdown of the unlimited charge for the period remaining at issue, i.e., December 1, 2003 through May 31, 2005, when the total charge for unlimited service was $49.99. Moreover, even if the May 2006 unlimited charge was applicable to the period remaining at issue, petitioner has offered no evidence whatsoever of any calculations or analysis showing how Trinsic arrived at its allocation of $8.09 to interstate calls. Petitioner thus failed to meet his burden to show that any portion of the unlimited charge was properly excluded from tax and the entire charge was properly taxable (***see Matter of Savemart, Inc. v. State Tax Commn.***; Tax Law § 1132[c]).

Q. Petitioner made further assertions regarding the portion of the charge for unlimited and value plan services that were attributable to interstate calls. Specifically, petitioner contended that $1.18 of the value plan charges were for interstate calls. Petitioner further contended that

13.5 percent of unlimited charges and 2.95 percent of value charges were attributable to interstate calls. These assertions are also unsupported by analysis or calculation and are similarly rejected.

R. Petitioner contends that the presumption of taxability under Tax Law § 1132(c) does not apply to items specifically excluded from tax under Tax Law § 1105. Petitioner reasons that tax on the item must be authorized to trigger the presumption. This contention is rejected. The presumption of taxability and the taxpayer's burden to prove entitlement to exemptions, exceptions or exclusions from tax is well established (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715 [1975], ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 [1975]; ***Matter of 677 New Loudon Corp.***, Tax Appeals Tribunal, April 14, 2010; ***Matter of Savemart, Inc. v. State Tax Commn.***).

S. Petitioner also contends that 49.6 percent of Trinsic's revenue during the period at issue was attributable to the unlimited plan and 27.4 percent of such revenue was attributable to the value plan (***see*** Finding of Fact 19) and that the audit results should be modified accordingly. This contention rests upon the summary documentation submitted in evidence at the hearing. Absent a review of the source documentation upon which the summaries in evidence were based, the evidence submitted lacks credibility and is therefore rejected. It is noted that certain service plans designated as "unlimited" for purposes of the summary documentation are not described in the record (***see*** Finding of Fact 19). Moreover, the disparity between the sales indicated by the summary documentation for the month of January 2007 and the gross sales reported for the December 1, 2006 through February 7, 2007 period raises questions as to the accuracy of the summary documentation (***see*** Finding of Fact 20). Finally, as the summary documentation is purportedly based on data from seven months of the audit period, the sales percentage information is itself an estimate of Trinsic's sales. It is well established that a taxpayer cannot

invalidate the Division's audit by offering its own "estimate" of tax liability as a substitute for the Division's (***see Matter of Albanese Rapid Mix***, Tax Appeals Tribunal, June 15, 1989; ***see also Matter of Wahba v. New York State Tax Commn.***, 127 AD2d 843 [1987]).

T. Petitioner also sought an adjustment in the audit results for bad debts. Similar to the claim for adjustment noted above, petitioner offered no source documentation in support of this claim. Furthermore, petitioner offered no evidence to tie the list of purported bad debts in the record to bad debts reported on Trinsic's federal income tax returns. Petitioner has thus failed to establish that the claimed amounts were uncollectible and has thus failed to establish entitlement for this credit (***see*** 20 NYCRR 534.7[a][1], [b][1]).

U. Petitioner's claim that the audit was flawed because it failed to account for changes in sales tax rates over the audit period is without merit. The assessment was computed by applying an error rate to sales tax as reported. Sales tax as reported would account for any changes in the prevailing rates.

V. Turning to the issue of penalties, Tax Law § 1145(a)(1)(i) states that any person failing to file or pay over any sales or use tax "shall" be subject to a penalty. This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (***Matter of MCI Telecommunications, Corp.***, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of

establishing reasonable cause as well as the absence of willful neglect (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993).

W. Petitioner claimed reliance on an outside accounting firm to prepare Trinsic's sales tax returns as a basis for abatement of penalties herein. Such a claim, without more, is insufficient to establish reasonable cause and an absence of willful neglect (***cf. Matter of LT & B Realty Corp. v. New York State Tax Commn.***, 141 AD2d 185, 535 NYS2d 121 [1988]; 20 NYCRR 2392.1[g][2][iv]). Accordingly, penalties imposed herein are sustained.

X. The petition of Horace Davis III filed in protest of the Conciliation Order Dismissing Request dated October 31, 2008 and Notices of Determination dated July 26, 2007 and August 16, 2007 are dismissed.

Y. The petition of Horace Davis III filed in protest of the Notice of Determination dated March 2, 2007 is denied and said notice is sustained.

DATED: Troy, New York
October 12, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE